“The Future of Private International Law in Australia” — Seminar in Sydney

Australian readers, and others who happen to be here on 16 May 2011, may be interested in a seminar to be held at Sydney Law School (Camperdown Campus) on that day from 6-7.30pm.

The seminar is entitled “The Future of Private International Law in Australia”. The speakers are:

- The Honourable Justice Paul Le Gay Brereton AM RFD, Judge of the Supreme Court of New South Wales and co-author of *Nygh’s Conflict of Laws in Australia* (8th ed);
- Dr Andrew Bell SC, New South Wales Bar and co-author of *Nygh’s Conflict of Laws in Australia*;
- Thomas John, head of the Private International Law Section of the Commonwealth Attorney-General’s Department; and
- Professor Andrew Dickinson, Professor in Private International Law at Sydney Law School and one of the specialist editors of *Dicey, Morris & Collins: The Conflict of Laws*.

A brochure can be found here.

Childress on the Alien Tort Statute and the Next Wave of International Litigation

Donald Earl Childress III (Pepperdine University School of Law) has posted The Alien Tort Statute, Federalism, and the Next Wave of International Law Litigation

on SSRN.

> *This Article examines the question of what role international law should play in domestic courts through the lens of the Alien Tort Statute ("ATS") and points to the next battlegrounds for transnational litigation under state and foreign law. The Article provides clarity as to why federal appellate courts have limited ATS cases. In light of federal retrenchment, this Article uniquely explores the potential for a new wave of international law litigation under state and foreign law and the potential for that wave to reach state courts. The Article analyzes forthcoming issues of federalism, choice of law, preemption, and due process that will arise as part of the next wave of international law litigation. After critically evaluating these areas, the Article provides a scholarly agenda for further study related to the question of international law in domestic courts. The Article seeks to apply the rich academic literature produced to date by such eminent scholars as Curtis Bradley, Jack Goldsmith, Harold Koh, and others to this new wave of transnational litigation. In so doing, it creates a new legal and normative framework for further studies regarding the role of international law in U.S. courts. The Article concludes by proposing a congressional fix that uses the Class Action Fairness Act of 2005 as a model for alleviating federalism concerns that exist when international law cases are brought in domestic courts.*

The paper is forthcoming in the *Georgetown Law Journal*.

The final CLIP Draft

The European Max-Planck Group on Conflict of Laws in Intellectual Property (CLIP) has recently published its final Draft Principles for Conflict of Laws in Intellectual Property (refered to by the Group as "the Draft"), which came after the the Third Preliminary Draft of the Principles we reported on here. The text of the Draft, available here, is supposed to remain substiantially the same in the 2012 commented version of the "Principles for Conflict of Laws in Intellectual Property" except for the editorial changes.

The main changes made in the newest Draft include: Article 2:206 (2) and (3) on multiple defendants, Article 3:401 on initial co-ownership, Article 3:604 on secondary infringement, Articles 3:801 and 3:802 (2) (e) on security rights, Article 4:201 on the verification of jurisdiction of foreign courts, and Article 4:501 (2) on other grounds for non-recognition of foreign judgements. As you can see, most of these changes were more of a fine-tuning nature.

I thank Thomas Petz for the tip off.

Fawcett & Torremans on Intellectual Property and Private International Law (2nd edn)

James Fawcett (*Nottingham*) and Paul Torremans (*Nottingham*) have published the second edition of their monograph on ***Intellectual Property and Private International Law*** (2011, OUP). The blurb:

- *Offers a comparative approach of private international law and intellectual property law and assesses how these disciplines impact on and co-operate with the other*
- *A new edition of a major work by top figures in the field which was the first full account in the legal literature and remains the only significant systematic treatment*
- *Addresses the large number of intellectual property cases that now involve foreign law, particularly in commercial courts and which are now of increasinging significance to practitioners*

New to this edition

- *Updated to take into account the replacement of the Brussels Convention by the Brussels I Regulation*
- *Updated to take into account the introduction of the Rome II Regulation*

dealing with the applicable law in relation to non-contractual obligations

- *Includes coverage of the extensive case law from national courts and the ECJ*
- *Brings case law on the issue of the Community Trade Mark and Directive up to date*
- *Includes all the major new Directives, eg implementing the WIPO treaties 1996*
- *Considers the development of the case law on the interaction between trade marks and domain names*
- *New chapters added; jurisdiction and validity of rights; jurisdiction, the internet and intellectual property rights; current proposals for jurisdictional reform; choice of law and the internet; reform in relation to the applicable law*
- *Fully updated and substantially rewritten to take account of the many major changes in the law over the past ten years*

Intellectual property has traditionally been regulated on a territorial basis. However, the protection and commercial exploitation of intellectual property rights such as patents, trade marks, designs and copyright occurring across borders are now seldom confined to one jurisdiction. This book considers how the introduction of a foreign element inevitably raises potential problems of private international law, ranging from establishing which court has jurisdiction and which is the applicable law to securing the recognition and enforcement of foreign judgments.

The Internet has brought a significant increase in the scale of this phenomenon and valuable new chapters have been added to this edition to reflect this. Nationally protected trade marks are now used globally on websites and copyright material is distributed, communicated and copied in a world without borders. Patents have already been licensed on a transnational basis for several decades. All this raises questions of jurisdiction and applicable law. The well-respected and expert author team address such questions as; which court will have jurisdiction to deal with the issues arising from intellectual property rights and their exploitation in an international context? And which national law will the court with jurisdiction apply? Private international law questions increasingly arise and the two disciplines that previously operated in different

spheres are increasingly obliged to co-operate.

Although such issues are becoming increasingly important, a dearth of literature exists on the subject. Fawcett and Torremans remedy that neglect and provide a systematic and comprehensive analysis of the topic that will be welcomed by practitioners and scholars alike.

Chapter 4 is available as a sample PDF. You can purchase it from Amazon UK for £185.25, or from OUP for £195.

Rühl on Consumer Protection in Choice of Law

Giesela Rühl, who is a professor of law at the Friedrich-Schiller-University in Jena (Germany), has posted Consumer Protection in Choice of Law on SSRN. The abstract reads:

Consumer protection in choice of law is a fairly young concept. In fact, the idea that consumers might be as much in need of protection in choice of law as in other areas of law did not loom large before the second part of the 20th century. However, after the consumer protection movement gained pace in the 1960ies and 1970ies, academics, courts and legislators were quick to transfer the concept into choice of law. First legislative provisions were enacted in the 1970ies with § 41 of the Austrian Act of Private International Law as well as Article 5 of the European Convention on the Law Applicable to Contractual Obligations (Rome Convention). In the 1980ies Switzerland followed suit with the adoption of Art. 120 of the new Swiss Act on Private International Law.

Today, consumer protection in choice of law is an integral part of legal systems around the world. Thus, it comes as a surprise that up to now the pertaining rules and regulations have received very little attention from economic theory. Even though there is – by now – a substantial body of literature that deals with

different aspects of conflict of laws from an economic perspective, the question of whether and – if so – how consumer should be protected in choice of law has been neglected.

In the paper at hand I fill this gap. More specifically, I analyse how choice of law rules should be designed in order to protect consumers in an efficient way. To this end, I proceed in three steps: In the first step I analyse the economic rationale for consumer protection in choice of law. I show that consumers are in need of protection because they suffer from information asymmetries. In the second step, I analyse how consumer protection can and should be afforded from an economic perspective. I focus on three mechanisms: first, self-healing powers of markets, second, duties of information, and, third, direct regulation of consumer contracts. I conclude that neither markets nor information duties are likely to limit the risks flowing from information asymmetries. As a result, I argue that the economically best way to protect consumers is to directly regulate consumer contracts. In the third and final step, I therefore analyse different models of consumer protection in view of their economic efficiency. I conclude that the European model of limiting party autonomy with the help of the so-called preferential law approach (Art. 6 Rome I-Regulation) is a good economic compromise. The same holds true for the – in practice very similar – American model of limiting party autonomy with the help of the fundamental public policy doctrine (§ 187 Restatement (Second) of Conflict of Laws). Both models trump all other ways of regulating choice of law in consumer contracts, most importantly the Swiss solution of excluding party autonomy in consumer contracts all together.

The paper is forthcoming in the *Cornell International Law Journal*.

Franzina on Jurisdiction

Regarding Rights in Rem in Moveable Property in the Brussels I Review

Pietro Franzina (University of Ferrara) has posted "The Proposed New Rule of Special Jurisdiction Regarding Rights in Rem in Moveable Property: A Good Option for a Reformed Brussels I Regulation?" on SSRN. The abstract reads:

> *On 14 December 2010, the European Commission published a proposal for the recasting of regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I). The proposal purports, inter alia, to add a provision granting non-exclusive jurisdiction "as regards rights in rem and possession in moveable property" to "the courts for the place where the property is situated". The paper examines the scope of application of the proposed new rule and the connecting factor it employs, in an attempt to determine whether it would be a useful addition to the existing rules on jurisdiction in civil and commercial matters in Europe. It concludes that, although it may in some cases (and subject to some conditions) serve the goals of proximity of predictability underlying the special heads of jurisdiction of the Brussels I regulation, the provision would bring more disadvantages than advantages, and suggests that the Commission's proposal in this respect should better be abandoned.*

The article is forthcoming in "Diritto del Commercio Internazionale" (issue 3/2011).

Forum Non Conveniens and

Foreign Law in Australia

A recent judgment of the New South Wales Court of Appeal contains a number of points of interest, even if the ultimate conclusion is routine and unsurprising: an Australian court refused an application for stay of proceedings on forum non conveniens grounds in a case concerning an Australian-resident plaintiff.

The facts in Fleming v Marshall [2011] NSWCA 86 were complex and multi-jurisdictional. An Australian man was killed in a plane crash in the State of South Australia. His dependent survivors, apparently based in the State of New South Wales, brought tort proceedings against the manufacturers of the aircraft and its engines who were located in the State of Pennsylvania, USA. To do so, the survivors engaged a New York firm of attorneys (who in turn engaged Pennsylvania agents) whose services were partly paid for by a litigation funder and partly by a contingency fee arrangement. The manufacturers ultimately reached a settlement with the claimants, out of which the New York attorneys claimed a success fee, and to which the attorneys attached conditions before they would pay the claimants in Australia.

The present litigation before the NSW courts was brought by the dependent survivors against the New York attorneys, as they were dissatisfied with the deductions and conditions attached to the settlement. They claimed that this amounted to breach of the contract of retainer, breach of duty of care in tort (a claim abandoned on appeal) and breach of fiduciary duty, as well as allegedly the tort of conspiracy. Significantly, the plaintiffs conceded that if New York law applied, their claim was time-barred by a now-expired 3 year limitation period, whether the claim was heard in New York or NSW.

The primary judge rejected the defendant's application for a stay on forum non conveniens grounds [[2010] NSWSC 86]. His Honour observed that 'there is no one cause and no one applicable law', and that each of the laws of South Australia, NSW and New York might be implicated. He also placed some importance on the lex loci contractus of the contract of retainer, which he considered to be most likely to be that of NSW.

On appeal, the defendants submitted that the case 'principally concerns the professional standards of lawyers practising in New York' and that the trial judge

was wrong to emphasise the importance of the place of contracting at the expense of the jurisdiction with which the contract had 'the closest and most real connection' [Bonython v Commonwealth of Australia (1950) 81 CLR 486; [1951] AC 201]. The plaintiffs resisted those contentions, and also emphasised the fact that (on their account of the facts) the New York attorneys had acted through Australian agents—therefore performing at least some of the retainer in Australia.

Macfarlan JA (with whom Spigelman CJ and Sackville AJA agreed) criticised the primary judge's treatment of the lex loci contractus:

> *"The primary judge correctly treated the identification of the proper law of the contract of retainer as relevant to the question of whether New South Wales is a clearly inappropriate forum for determination of the disputes between the parties. However in determining what was the proper law of the contract (that is, that with which the transaction had "the closest and most real connection": Bonython) his Honour in my view placed undue emphasis upon the place where it was concluded. If read on its own, paragraph [38] of the primary judgment (see [43] above) would suggest that his Honour regarded the place of contracting as determining, rather than simply being relevant to, the identity of the proper law." [at [61]]*

That being the case, the Court of Appeal proceeded to decide for itself the question of whether NSW was a clearly inappropriate forum, but ultimately reached the same view as the primary judge. Along the way, they emphasised:

- the unavailability of New York as an alternative forum because of the statute bar;
- the fact that it was 'not appropriate that at this stage of the proceedings a final determination be made as to the identity of the proper law of the contract of retainer', despite their Honours' 'provisional view' that it was New York law;
- the fact that, even if foreign law applied, this was 'not of itself a reason for granting a stay';
- the irrelevance of the lawyers' professional indemnity insurance cover being limited to proceedings brought in the US or Canada.

These conclusions are entirely within the mainstream of Australian private international law. As repeated decisions demonstrate, the practical reality is that

Australian courts will never under any circumstances relinquish jurisdiction in a case concerning an Australian-resident natural plaintiff.

One topic referred to in the judgment which was not of direct importance to the case at hand is nonetheless likely to be of wider interest to non-Australian readers, namely the reference of questions of foreign law by the forum court to a court of that foreign jurisdiction. This was of potential future relevance to the case since the NSW forum was likely to end up applying New York law. The Supreme Court of NSW and the Supreme Court of New York have recently entered into a bilateral arrangement to facilitate such references, and Chief Justice Spigelman has recently published an article on the topic: J J Spigelman "Proof of Foreign Law by Reference to the Foreign Court" (2011) 127 Law Quarterly Review 208. More details of the NSW-New York bilateral arrangements can be found here on the NSW Supreme Court's website.

In the context of the case at hand, the Chief Justice remarked that:

> *"It is by no means clear whether the present case is one in which this mechanism for deciding such an issue would be more cost effective than the customary means of determining a question of foreign law by expert evidence. However, the determination of an issue of professional practice is one of the kinds of legal issues for which there is unlikely to be a single correct answer. Advice from three serving appellate judges of the foreign jurisdiction is much more likely to be accurate than an Australian judge choosing between contesting expert reports." [at [10]]*

American Society of Comparative Law Younger Comparativists

Committee Call for Papers

I am happy to post the following call for papers that should be of interest to our readers.

AMERICAN SOCIETY OF COMPARATIVE LAW

YOUNGER COMPARATIVISTS COMMITTEE – CALL FOR PAPERS

The Younger Comparativists Committee of the American Society of Comparative Law is pleased to invite submissions to fill a panel on "New Perspectives in Comparative Law," to be held at the Society's 2011 Annual Meeting in Sacramento, California, on October 20-22, at the University of the Pacific, McGeorge School of Law. The purpose of the panel is to highlight the scholarship of new and younger comparativists.

Submissions will be accepted on any subject of public or private comparative law from scholars who have been engaged as law teachers for ten years or fewer as of July 1, 2011. The Scholarship Advisory Group of the Younger Comparativists Committee will review submissions with the authors' identities concealed. Two submissions will be chosen for the panel.

To submit an entry, scholars should email an abstract of 1200-1500 words (including footnotes) no later than June 6, 2011, to Judy Yi at the following address: judy.yi@bc.edu. Abstracts should reflect original research that will not yet have been published by the time of the Society's Annual Meeting. The abstract should be accompanied by a separate cover sheet indicating the author's name, title of the paper, institutional affiliation, and contact information. The abstract itself must not contain any references that identify the author or the author's institutional affiliation.

Scholars whose entries are selected for the panel will be required to submit final papers no longer than 25,000 words by August 15, 2011.

Please direct all inquiries to Richard Albert, Chair of the Younger Comparativists Committee, by email at richard.albert@bc.edu or telephone at 617.552.3930.

French Court Rules Foreign Freezing Orders have Res Judicata

In a judgment of March 8th, 2011, the French Supreme Court for private and criminal matters (*Cour de cassation*) confirmed that a Greek order refusing to authorize the pre-award attachment of a ship in Athens was to be recognized in France. As a consequence, the French court could not try again the dispute and authorize to attach the same ship in France a year later.

We had already reported on the decision of the Court of appeal of Rouen which had denied the application of the (alleged) creditor on the ground that a Greek court had already done so. The *Cour de cassation* dismissed an appeal against this decision.

Background

It should be underlined that freezing attachments are carried out in two stages both in France and, I understand, in Greece. First, a court authorizes an enforcement authority to carry out the attachment. Then, the said authority does. The issue in this case was whether the decision on whether to authorize to carry out the attachment issued in Greece had res judicata effect in France.

Territoriality Principle Irrelevant

The first argument put before the Court by the appellant was that freezing attachments belong to enforcement, and are thus unable to produce extra-territorial effect. The Greek order, it was argued, might not be recognized in France, since it could not possibly purport to produce effect outside of Greece.

The *Cour de cassation* answered to this argument by saying that Article 33 of the Brussels I Regulation demanded that the Greek order be recognized. The Court thus ruled that the Court of appeal was right to consider that the foreign order could produce effect extra-territorially. In passing, the Court explained that the Court of appeal had rightly refused to review the foreign order on the merits.

Res judicata

The appellant then raised a variety of arguments against the foreign order having res judicata in France. One of them was that, as the foreign court had applied the lex fori, the triple identity rule was not satisfied, since a French court would apply a different law. Another was that, as the ship had moved, there was a new fact which justified a new decision.

The *Cour de cassation* answered to these two arguments as follows. First, it ruled that there indeed was a triple identity between the two cases, and that the Court of appeal had verified that it was asked to rule on a point which had already been settled by the foreign order. Secondly, it had not been argued before the Court of appeal that there was any new fact which would justify not taking into consideration the foreign order.

Many thanks to Sebastien Lootgieter for the tip-off.

NY Court Grants Pre-Award Attachment in Aid of Foreign Arbitration

In *Sojitz Corp. v. Prithvi Information Solutions Ltd,* the New York Supreme Court (ie an intermediate appellate court) recently agreed to grant a pre-award attachment in aid of an arbitration with a foreign seat (Singapore) and between two foreign parties over which NY courts did not have personal jurisdiction.

In 1982, the New York Court of Appeals (ie the supreme court in the state of NY) had held in *Cooper* that NY courts did not have such power.

See the report of G. Born and T. Snider over at the Kluwer Arbitration Blog.